No. 93-568

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

ALLIED PRODUCTS CORPORATION,
a foreign corporation,

Petitioner,

v.

RAYMOND RENKIEWICZ, Personal Representative of the Estate of EUGENE RENKIEWICZ, Deceased and JOSEPH and ETHEL L. NORTLEY, Co-Personal Representatives of the Estate of MARY NORTLEY RENKIEWICZ, Deceased,

Respondents,

and

WHITE FARM EQUIPMENT COMPANY, INC., formerly known as MINNEAPOLIS-MOLINE, a foreign corporation, and BOARD OF COUNTY ROAD COMMISSIONERS FOR THE COUNTY OF CHARLEVOIX, a municipal corporation, jointly and severally,

Defendants.

Petition For Writ Of Certiorari To The Court Of Appeals Of Michigan

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court should deny certiorari in a case involving a state law interpretation of the state's principles of successorship liability?

Whether the Michigan Court of Appeals correctly determined that, as to Petitioner Allied, the Orders of the Bankruptcy Court could not have been interpreted as allowing Allied to take free and clear of the yet to be in existence claim of the Renkiewiczes, inasmuch as the Renkiewiczes' claim did not arise until a month after the plan was confirmed and Allied was operating its business as a successor corporation?

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INTRODUCTION

There are several reasons why this Court should deny the Petition. First, the essential question decided by the Michigan Court of Appeals, from which certiorari is sought, is a question of successor corporate liability under Michigan state law. Second, both the Michigan Court of Appeals and the Michigan Supreme Court, in their respective decisions, recognize that this case is not yet ripe for adjudication. Defendants moved for summary disposition before any discovery was done, far in advance of any fact finding by a court or a trier of fact. As such, the case is not yet ripe for adjudication. Third, the Court of Appeals made the correct decision. As to Petitioner Allied (as opposed to the Bankrupt, White Farm Equipment), the contact with the bankruptcy proceedings as purchaser of assets was completed prior to the date on which the Renkiewiczes were injured. As such, Allied could not have taken the assets free and clear of a claim which had yet to come in existence, unless some extraordinary measure was taken (as in the Dalkon Shield and asbestos bankruptcies) to have some sort of representation during the acquisition process of future, as yet unaccrued claims. Inasmuch the Renkiewiczes were not represented in any way prior to the confirmation of the plan and Allied's assumption of control over the assets of the predecessor corporation, under any existing definition of claim under the Bankruptcy Code, there was no claim in existence as of the time of the court order for Allied to take free and clear of.

For any of these reasons, this Court would be correct in denying Respondents' Petition for Certiorari.

COUNTER-STATEMENT OF THE CASE

On December 15, 1987, plaintiff's decedent, Eugene Bernard Renkiewicz and his wife, Mary Margaret Renkiewicz were driving a farm tractor along Quarterline Road in Charlevoix County, Michigan. The road was slick and slippery; the tractor began to slide off the road on a small slope near Burgess Road. The embankment off the shoulder of the road was unguarded by a guardrail; when the tractor left the road it rolled over on its side, killing plaintiffs' decedents.

The tractor in question, a Minneapolis-Moline A4T-1600 1973 four wheel drive tractor model number N855-C250, reference number 33985, engine number 713193, was designed, manufactured and sold by defendant White Farm Equipment Company.

The link between White Farm Equipment Company and the current defendant-appellee, Allied Products, is set forth in an affidavit of David B. Corwine, General Counsel and Assistant Secretary for Allied Products Corp., submitted to the trial court as part of defendant's motion for summary disposition. In that affidavit, Mr. Corwine relates that, in 1985, White Farm Equipment Company went into Chapter 11 bankruptcy. As part of that proceeding, Allied Products purchased "certain assets of White Farm Equipment Company, pursuant to an asset purchase agreement, executed October 9, 1985." Those "certain assets", according to the acquisition agreement, are defined as "all of the assets, properties, rights and business of White of every type and description."

Further, Allied kept the White Farm employees but simply negotiated and executed a new labor contract with them. The acquisition agreement also specifically stated that:

> "White will use its best efforts to preserve its business organization intact and to keep available to Allied the services of its present officers, employees, sales representatives, and agents, and to preserve the good will of suppliers, dealers, and others having business relations with them or Allied."

The bankruptcy court order which approved the acquisition of the "certain assets" of White Farm by Allied, also submitted as part of defendant's motion, stated as follows:

> "On September 19, 1985, White Farm Equipment Company ('WFE'), debtor in possession in this Chapter 11 proceeding, filed its motion pursuant to 11 USC §§ 363(b) and 363(f) ('the WFE sale motion') requesting authorization to consummate a proposed acquisition transaction with Allied Products Corporation ('Allied') whereby Allied is to acquire *substantially all* of WFE's assets, free and clear of liens, claims and encumbrances, in accordance with a certain letter of intent dated September 11, 1985, and pursuant to specific terms and provisions more fully set forth in a certain 'agreement for acquisition of assets of White Farm Equipment Company in exchange for preferred stock of Allied Products Corporation' ('Allied acquisition agreement') dated October 9, 1985."

The bankruptcy court made clear that Allied was contemplating a purchase of White Farm Equipment Company as an ongoing business, rather than as the sum

total of its fixtures, buildings and other properties, in the following paragraphs:

> "Y. WFE does not have sufficient capital, nor is there any reasonable likelihood of WFE obtaining sufficient capital, to propose and consummate a Chapter 11 plan, absent a sale of its business and assets to a third party.
>
> Z. WFE has not received any bonafide offers for the sale of its businesses or its assets which are worthy of consideration, other than Allied offer.
>
> AA. The nature of WFE's primary business, the manufacture and sale of tractors and farm implements, and the market conditions imposed by virtue of that business, requires the immediate consummation of the Allied transaction in order to provide Allied with sufficient lead time to commence new manufacturing and product distribution for the spring selling season.
>
> BB. WFE's remaining dealers do not have a sufficient inventory of tractors or farm implements to offer for sale to consumers. Consequently, WFE is in danger of losing its entire dealer network and customer base.
>
> CC. Consummation of the Allied transaction will result of the maintenance of WFE's dealer network and customer base.
>
> DD. Consummation of the Allied transaction will result in the continuation of WFE's businesses as well as a preservation of WFE's existing labor force.
>
> EE. Consummation of the Allied transaction will result in the elimination of significant

> liabilities of WFE's estate, including claims related to certain product warranties, employee benefits and certain contractual obligations.
>
> FF. Consummation of the proposed transaction will result in the preservation of the value of WFE's existing inventory in the hands of its dealers and consumers."

In the order authorizing the sale, the trial court noted that it had previously issued an order on September 23, 1985, which set October 18, 1985 as the last day "for parties in interest to file either objections to the WFE sale motion or an appropriate pleading asserting a lien, claim, encumbrance or other alleged property right . . . in the reorganization assets." Some objections were filed, but were deemed insufficient, in light of the court's finding of facts, to prevent the proposed sale of assets.

In the acquisition agreement referenced to by the bankruptcy court, Allied sought to disclaim liability for any product liability claims relating to White Farm products with the following contractual language:

> "Without limiting the generality of the foregoing, Allied does not assume and shall not be liable for product liability claims for any products manufactured by White prior to the final closing date, liabilities to employees or former employees of White arising out of their employment by White prior to the final closing date except accrued DIP employee claims, liabilities to dealers, and liabilities for state and federal taxes, personal property taxes, and sales and use taxes."

Certain product liability claims which had already accrued were delivered to Allied by White on a schedule

which set forth the nature, amount and disposition thereof.

After the confirmation of the sale, the bankruptcy proceedings against the remnants of White Farm continued. After the confirmation of the sale, the bankruptcy court established March 31, 1986 as the bar date for anyone to file a claim against the remnants of White Farm Equipment. All claims filed after March 31, 1986 were rejected as untimely. As the Michigan Court of Appeals opinion noted, the bankruptcy court confirmed the total plan filed by the official committee of unsecured creditors on November 11, 1987. As previously stated, the Renkiewiczes did not have any claim against either White Farm or Allied Products prior to December 15, 1987.

Since that time, Allied Products has continued the business of White Farm Equipment Company. In fact, Allied has adopted, through its advertising, the names of "Minneapolis-Moline" and "White Farm."

PROCEDURAL HISTORY

Respondents filed their complaint in 1989 against petitioner Allied Products Corp. and defendants White Farm Equipment Company, Minneapolis-Moline and Board of County Road Commissioners for the County of Charlevoix. As against White Farm, Minneapolis-Moline and Allied, plaintiffs brought claims of product liability, breach of warranty, fraud and misrepresentation and strict liability. As against the Board of County Road Commissioners, plaintiffs brought allegations of nuisance and negligence. As against petitioner Allied Products Corp.,

respondents specifically alleged that it was the successor corporation of defendant White Farm Equipment Company, and that it was liable under Michigan law for any and all damages incurred as a result of the sale of products by defendant White Farm Equipment Company.

Defendant Allied Products Corp. immediately moved for summary disposition. The trial court, after briefing and argument, granted the motion.

Respondents appealed to the Michigan Court of Appeals. Oral argument was had, and in a published opinion, *Renkiewicz v Allied Products Corp*, 196 Mich App 309; 492 NW2d 820 (1992), the Court of Appeals reversed the trial court. After analyzing the applicable bankruptcy code provisions, and the case law interpreting them, the Court of Appeals held as follows:

> "Because the reorganization plan was confirmed before the time plaintiffs' claims arose, we find plaintiffs' claims cannot be discharged by the bankruptcy court under [11 USC] § 1141(d). As a result, the trial court erred when it granted defendant's motion for summary disposition, holding that the bankruptcy court's ruling preempted state law governing successor liability in situations involving an unaccrued future claim."

The Court of Appeals then prudently deferred any decision on the issue of successorship liability itself:

> "The question we must now answer is whether a record might be developed upon which reasonable minds could differ regarding the existence of successor liability. However, when the trial court granted defendant's motion for summary

> disposition on the ground that the bankruptcy code was supreme and superseded state tort law, it held that there was no need to address whether a continuity of enterprise existed between White Farm and defendant Allied under the theory of successor liability. Because we find that the trial court erred in granting Allied's motion for summary disposition, we reverse and remand to the trial court for further proceedings." *Id* at 318-319.

Petitioner thereafter moved for rehearing in the Court of Appeals, which motion was denied. Petitioner then applied to the Michigan Supreme Court for leave to appeal. The Supreme Court denied defendants' application, for the specific reason that the Court would not review the question presented prior to the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals. Defendant now brings the instant Petition for Writ of Certiorari to this Court. For the reasons set forth in the following brief, that Petition should be denied.

SUMMARY OF ARGUMENT

The reasons why this Court should not grant certiorari in the instant case are set forth in the instant brief. First, the Michigan Court of Appeals' decision was essentially one of state law. The issue is whether Allied is to be held liable, as a successor corporation to White Farm, for a defective product sold by White Farm, which defect caused the plaintiffs' deaths. This inquiry is governed by Michigan law, which in turn depends on the application

of factual tests. As such, this is a state decision resting primarily upon state tort law, which should not be reviewed by this court. Second, the issue is not yet ripe for adjudication. Both the Michigan Court of Appeals and the Michigan Supreme Court recognized that, in order to properly adjudicate the issues presented, further factual development was necessary, inasmuch as defendant's motion was made immediately after the pleadings, and before any discovery had been conducted. The issues presented by defendant, even if meritorious, are not yet ripe for review by this court. Third, the Michigan Court of Appeals made the correct decision. The application of bankruptcy law is not applied in this case to the bankrupt, White Farm, but to the purchaser of assets in bankruptcy, Petitioner Allied. It is undisputed that all orders relating to Allied's acquisition of nearly all of White Farm's assets, including the court order authorizing White Farm to take "free and clear of claims", were entered prior to the date on which the product resulted in the Renkiewiczes deaths. As such, even under the most expansive definition of the word "claim", there is no authority for the proposition that the Bankruptcy Court had the power to grant Allied freedom from claims which had not yet come into existence. There is a limited exception which is currently still being hashed out relating to mass tort situations, in areas such as Dalkon Shield and asbestos, but in these cases, provision was made for after-arising claims, and representation of as yet unaccrued claimants was provided for during the bankruptcy proceedings. Neither of these safeguards were in place here. Allied cannot claim the protection of a bankruptcy court

order which did not any way allow for the participation of the Renkiewiczes or someone standing in the shoes.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTION OF LIABILITY OF SUCCESSOR CORPORATIONS, HOWEVER THE ASSETS ARE ACQUIRED, IS A STATE LAW MATTER

A. THE QUESTION OF STATE SUCCESSOR CORPORATION LIABILITY FOR AN ENTITY NOT ITSELF SEEKING BANKRUPTCY PROTECTION IS A STATE QUESTION, NOT A FEDERAL ONE.

This Court has consistently adhered to the principle that a state court judgment, based upon an adequate and independent nonfederal or state ground, will not be disturbed even though a federal question is involved, and even though that federal question is arguably wrongly decided. *Berea College v Kentucky*, 211 US 45, 53 (1908). This court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Zacchini v Scripps Howard Broadcasting Company*, 433 US 562, 566 (1977).

Here, plaintiff made out a prima facie case for the imposition of successorship liability under *Turner v Bituminous Casualty Company*, 397 Mich 406; 244 NW2d 873 (1976). The leading Michigan case on point, as it relates to the role of a bankruptcy court in the purchase of assets, is *Pelc v Bendix Tool Machine Corp*, 111 Mich App 343; 314 NW2d 614 (1981). In *Pelc*, despite the fact that the

successor corporation in *Pelc* acquired the assets through a bankruptcy liquidation, the Court of Appeals found it unnecessary to address the federal issues to decide the question, but rather, interpreted state law successor corporate liability issues. *Id* at 356.

This has also been the experience in other states. For instance, California has established judicially a regime of successor corporate liability in *Ray v Alad*, 19 Cal 3d 22; 136 Cal Rptr 574 (1977). A recent California case, *Stewart v Telex Communications, Inc*, 1 Cal App 4th 190; 1 Cal Rptr 2d 669 (1991), by reference to state law, established a rule as to the role of bankruptcy court proceedings in transfer of assets from a predecessor corporation to a successorship corporation. Three of the cases relied upon by petitioner as authority in federal bankruptcy interpretation, *Nelson v Tiffany Industries*, 778 F2d 533 (9th Cir 1985), *Conway v White Trucks*, 692 F Supp 442 (MD Pa 1988), aff'd, 885 F2d 90 (3d Cir 1989), and *Wallace v Dorsey Trailers Southeast*, 849 F2d 341 (8th Cir 1988) were also actually decided on state successorship law. No state has applied federal law in determining the liability of successorship corporations, even in cases where there is bankruptcy court participation in the transfer of assets.

This is proper in that it is not Allied which is seeking relief in bankruptcy – Allied is a thriving, ongoing business subject to state tort law as any other business. This Court should decline the opportunity to visit this area of state tort law merely because of the incidental presence of a bankruptcy court proceeding. Petitioner's Writ of Certiorari should be denied.

B. BECAUSE BOTH THE MICHIGAN COURT OF APPEALS AND THE MICHIGAN SUPREME COURT REMANDED THIS CASE BACK FOR FACT FINDING, THE CASE IS NOT RIPE FOR ADJUDICATION BY THIS HONORABLE COURT.

As noted in the Appendix of Petitioner, the Michigan Court of Appeals decision rested, in part, upon the fact that no record was developed upon which reasonable minds could determine the existence of successor liability. Appendix of Petitioner at A-11. In the Order denying application for leave to appeal, the Michigan Supreme Court ruled that it was "not persuaded that the questions presented should be reviewed by this Court prior to the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals." *Id* at C-2.

Here, the fact of continuing state proceedings, which are essential to determine the presence or absence of successor corporate liability, render any review by this Court as premature. Further state proceeding may help avoid fragmenting and prolonging the litigation, and may in fact cause this Court to make a determination lacking later developed facts as may be ascertained through discovery. *North Dakota State Board of Pharmacy v Snyder's Drug Stores*, 414 US 156, 159 (1973)

II. BECAUSE EVERYTHING NECESSARY TO ACCOMPLISH THE TRANSFER OF ASSETS TO ALLIED HAD BEEN ACCOMPLISHED PRIOR TO THE RENKIEWICZES FATAL ACCIDENT, THE PETITIONER COULD NOT HAVE TAKEN THE ASSETS FREE AND CLEAR OF THE RENKIEWICZ'S CLAIM.

As properly found by the Court of Appeals, both the language of the federal bankruptcy code, and practice and case law thereunder mandate the result in this case. Where the entirety of a claim arises regarding the product of a bankrupt entity after all dispositive orders of the court have been entered regarding claims against that entity, whether in a winding down, or in a purchase of assets of a business under Chapter 11, the claim cannot have been discharged or limited in any fashion by any order of the bankruptcy court in the previous proceedings. Although the claim need not be liquidated, or even in a collectible form, it must be, at the very least, pending or in existence. Although limited exception has been made in a few mass tort situations, such was only done after representation was provided to future claimants, and provision made for some sort of remedy. Such was not provided for here, and the Court of Appeals correctly concluded that plaintiff's claim could be asserted against the successor corporation, if such could be established.

It is petitioner's position that because it purchased White Farm Equipment in a Chapter 11 sale approved by a bankruptcy court, that it therefore assumed no liability for any future product liability claims arising out of use of products previously sold by White Farm Equipment. This is an improper expansion of bankruptcy law; it

would have the effect of granting to bankruptcy courts a power not specifically or impliedly granted them by Congress in the bankruptcy code. Accordingly, defendant's argument must fail, no matter how laudible the policy it might arguably further.

The bankruptcy court only has the power to carry out the provision of that part of the bankruptcy code in effect at the time it renders its decisions. *In re Amatex Corp*, 755 F2d 1034 (3d Cir 1985). The applicable bankruptcy code in existence at the time of the decision regarding Allied's acquisition of White Farm Equipment was the 1984 act. Under this act, the following definitions were in existence: Section 101 of the bankruptcy code, 11 USC §101, provided as follows:

> "(4) Claim means – (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured;
>
> * * *
>
> (9) Creditor means – (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
>
> * * *
>
> (11) Debt means liability on a claim."

In the bankruptcy court hearing in *In re Amatex Corp*, 30 BR 309 (Bkrtcy ED Pa 1983), the court cited Congressional history in determining that a court had no power to discharge as yet unaccrued claims of potential future tort claimants, stating:

> "Valuable information may be gleaned from an examination of the legislative history of the foregoing code provisions. Concerning the definitions of the term "creditor" and "debt", the legislative history provides as follows:
>
> > 'Creditor is defined to include only holders of pre-petition claims against the debtor. However, it encompasses certain holders of claims that are deemed to arise before the date of the filing of the petition, such as those injured by the rejection of an executory contract or unexpired lease, certain investment tax credit recapture claim holders, involuntary gap creditors, and certain holders of the right of setoff. The term also includes the holder of a pre-petition community claim. A guarantee of or surety for a claim against a debtor will also be a creditor, because he will hold a contingent claim against a debtor that will become fixed when he pays the creditor whose claim he has guaranteed or insured.
>
> > * * *
>
> > Debt is defined in paragraph (11) as a liability on a claim. The terms are co-extensive: A creditor has a 'claim' against the debtor; the debtor owes a 'debt' to the creditor.'
>
> [House Report No. 95-595, 95th Cong 1st Sess 309-310 (1977); see Senate Report No. 95-989,

> 95th Cong 2d Sess 22-23 (1978), US Code Cong & Admin News 1978, pp 5787, 5808-09, 6266-67]." *Id* at 315.

This result was modified in the appellate decision in *Amatex*. The Third Circuit reversed the bankruptcy court insofar as the bankruptcy court ruled, because there could be no discharge of as yet unaccrued future claims, that the future claimants were not entitled to a representative in a bankruptcy proceedings. However, the court did not overrule that part of the bankruptcy court's decision standing for the proposition that future unaccrued tort claims cannot be discharged by a bankruptcy court:

> "Bankruptcy Judge King based his recommendation to deny Amatex's motion to appoint a legal representative for future claimants on a determination that such individuals as yet had no cognizable claims under the code. Therefore, he believed, future claimants are not "creditors: and their claims may not be discharged, or even affected, in a reorganization plan. We need not reach the merits of these conclusions in order to ascertain that future claimants do have a sufficient interest to require some representation during the reorganization proceedings. Whether or not future claimants have claims in the technical bankruptcy sense that can be affected by a reorganization plan, such individuals clearly have a practical stake in the outcome of the proceedings." *In re Amatex Corp*, 755 F2d 1034, 1041 (3d Cir 1985).

Thus, the *Amatex* appellate court decision had the effect of providing even greater protection to future

claimants by allowing them representation at the proceedings. In the instant case, no such representation existed. No one spoke on behalf of future claimants, whose rights Allied sought to foreclose before such rights came into existence. The bankruptcy court had no power to do so under the code.

Although the *Amatex* case is instructive, numerous cases also discuss potential future claims which had yet to accrue by the date of the finalization of the bankruptcy. These cases hold that in order for a debt to be discharged in the bankruptcy, the debt must be in existence prior to the date that the bankruptcy is finalized. Otherwise, such is a mere contingent claim. *In re Pacor, Inc*, 110 BR 686 (ED Pa 1990). See also, for example, *Matter of Pyles*, 38 BR 92 (WD Mo 1984); *In re Ford*, 87 BR 641 (D Nev 1988); *Behrens v Woodhaven Association*, 87 BR 971 (ND Ill 1988).

In Michigan, a products liability claim does not accrue until some injury occurs. *Connolly v Paul Ruddy's Equipment Company*, 388 Mich 146; 200 NW2d 70 (1972); *Larson v Johns-Manville Sales Corp*, 427 Mich 301; 399 NW2d 1 (1986). To say that an owner of a tractor, even if that owner could prove that the tractor was negligently designed, could bring suit for potential, but yet to occur, future injuries is ludicrous. Yet that is the position petitioner is taking in claiming that the bankruptcy court had the power to discharge such a future, unaccrued claim by any order issued between 1985 and 1987.

Petitioner's claim is further undermined by the fact that the overwhelming majority of the cases it relies upon actually involved claims which arose either prior to filing

of bankruptcy, or, at the latest, prior to the final confirmation of the sale of assets or reorganization. In *American Living Systems v Bonapfel* (In re All-American of Ashburn, Inc), 56 BR 186 (ND Ga 1986), aff'd on the other gds, 805 F2d 1515 (11th Cir 1986), the claim arose prior to the date of the sale to the purchasing corporation. Similarly, the claim arose prior to the sale of assets in *Forde v Kee-Lox Manufacturing*, 437 F Supp 631 (WDNY 1977), aff'd on other gds, 584 F2d 4 (2d Cir 1978), *In re Korhumel Industries*, 103 BR 917 (ND Ill 1989), and *Volvo White Truck Corp v Chambersburg Beverage Inc* (In re White Motor Corp), 75 BR 944 (ND Ohio 1987). Many of the cases relied upon by defendant involved claims which were held to have arisen prior to the filing of bankruptcy, much less the approval of a confirmation plan. Falling into this category are *In re Chateaugay Corp*, 112 BR 513 (SDNY 1990), aff'd 944 F2d 997 (2d Cir 1991), *Roach v Edge* (In re Edge), 60 BR 690 (MD Tenn 1986) and *Rubinstein v Alaska Pacific Consortium* (In re New England Fish Company), 19 BR 323 (WD Wash 1982).

In two mass tort situations, involving the notorious Dalkon Shield and various manufacturers of asbestos products, a unique remedy was fashioned to achieve the sometimes divergent goals of finality and protection of future claimants. In *Grady v A H Robins Company*, 839 F2d 198 (4th Cir 1988), cert dismissed sub nom *Joynes v A H Robins, Inc*, 487 US 1260 (1988), a legal representative was appointed for future tort claimants. A similar voice was provided to future asbestos victims in the *Amatex* case, as well as the related asbestos case of *In re UNR Industries*, 19 BR 741 (ND Ill 1983), appeal dismissed, 725 F2d 1111 (7th Cir 1984) on rem, 46 BR 671 (ND Ill 1985).

The only cases which are on point, are the same ones which were discussed in the Michigan Court of Appeals: The District of Maine's decision in *Paris Manufacturing Corp v Ace Hardware Corp*, 132 BR 504 (D Me 1991), which supports petitioner's position, and *Mooney Aircraft Corp v Foster* (In re Mooney Aircraft, Inc,) 730 F2d 367 (5th Cir 1984) and *Schweitzer v Consolidated Rail Corp*, 758 F2d 936 (3d Cir), cert den sub nom *Reading Company v Schweitzer*, 474 US 864 (1985). Comparing these cases, the better view is that of *Mooney* and *Schweitzer*. The Renkiewicz's claim did not arise, under Michigan law or under the Bankruptcy Code, prior to the date on which the bankruptcy court confirmed the plan which included the sale of virtually all the assets of the bankrupt to petitioner, the successor corporation. Respondents did not participate in these proceedings, and under bankruptcy law or Michigan law, could not have. The court did not appoint any representative to speak on behalf of future tort claimants whose claims had yet to accrue. Under these facts, the Michigan Court of Appeals made the only decision it could have: It allowed respondents' suit to proceed against petitioner if a case could be made out under Michigan successor corporation law.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to the Court of Appeals of Michigan.

Respectfully submitted,

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